

A **BADRU DUJA KHAN MOHAMED NABI KHAN (DECD)**
v. AYAZ AHMAD MOHAMED SALLEH KHAN & ORS

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
VAZEER ALAM MYDIN MEERA JCA
B MOHD SOFIAN ABD RAZAK JCA
[CIVIL APPEAL NO: K-02(IM)-2377-11-2018]
10 DECEMBER 2020

C **CIVIL PROCEDURE:** *Costs – Taxation – High Court dismissed claim with costs – High Court order made under Rules of the High Court 1980 – Order did not stipulate time within which bill of costs was to be filed – Party acted upon order to tax costs more than seven years later when seeking extension of time – Whether court could grant time for costs to be taxed – Whether matter time-barred – Limitation Act 1953, s. 6(1) & (3)*

D **LIMITATION:** *Costs – Taxation – High Court dismissed claim with costs – High Court order made under Rules of the High Court 1980 – Order did not stipulate time within which bill of costs was to be filed – Party acted upon order to tax costs more than seven years later when seeking extension of time – When time of limitation started to run – Whether limitation had set in – Whether order time-barred – Limitation Act 1953, s. 6(1) & (3)*

E The High Court had dismissed the appellant's ('plaintiff') claim with costs ('order') on 31 October 2010. The order was affirmed by the Court of Appeal on 5 December 2012. When the order was made, the Rules of the High Court 1980 ('RHC 1980') was applicable and since costs were not quantified, the
F respondents ('defendants') were entitled to tax the costs, pursuant to O. 59 of the RHC 1980, by filing a bill of costs. The order, however, did not stipulate the time within which the bill of costs was to be filed or presented by the defendants for taxation. Following that, it was only on
G 30 April 2018, which was more than seven years later, did the defendants act upon the order to tax their costs, when it sought extension of time to proceed with the taxation for costs ('encl. 15') at the High Court. According to the defendants, the delay was because they had initially waited for the plaintiff's appeal to the Court of Appeal to be heard and disposed. Along the way, there were several changes of solicitors but these solicitors had not acted on the defendants' instructions to tax the costs. The defendants' present
H solicitors had then filed encl. 15 when they took over the conduct of the matter but, by this time, RHC 1980 had been repealed and replaced by the Rules of Court 2012 ('ROC 2012'). The plaintiff objected to encl. 15 on the ground that the defendants were barred by statutory limitation under s. 6 of the Limitation Act 1953 ('Act'). The High Court allowed encl. 15 as it was
I found that (i) the order was not time-barred since it had a 12 years statutory

period of limitation in accordance with s. 6(3) of the Act; and (ii) time for limitation started to run from the date the Court of Appeal dismissed the plaintiff's appeal, which was on 5 December 2012. Hence, the present appeal by the plaintiff. The issues that arose for adjudication were: (i) whether the court could grant time to the defendants for costs to be taxed; and (ii) whether the matter was time-barred under s. 6(1) of the Act.

Held (fixing costs of proceedings at High Court as per order as well as costs for this appeal)

Per Vazeer Alam Mydin Meera JCA delivering the judgment of the court:

- (1) It was obvious, from O. 59 rr. 14(1)(a), (b) and (c) of the RHC 1980, that when no time for compliance is stipulated in an order for costs, time was at large and the Registrar has the power to fix time if the need should arise. However, O. 57 r. 7(2) of the RHC 1980 required an applicant not to delay a taxation proceeding unnecessarily. If there is an unnecessary delay, the court may take into account the delay in determining the quantum of costs. In the present case, the High Court did not fix time and, following that, the defendants were not required to take immediate action to enforce the award of costs. Therefore, there was nothing in law to bar the defendants, purely by reason of passage of time, from executing the order and having the quantum of costs determined. (paras 19 & 20)
- (2) A plain reading of s. 6(1) of the Act shows that it is not applicable to an award of costs as the word 'action' used in that section is in connection to a cause of action. The taxing of the bill of costs is not cause of action to enforce an award but, rather, a continuation of proceedings to ascertain the quantum of costs awarded. Therefore, an order for costs is a consequential order and must be sought in the proceedings. A fresh action could not be brought to recover costs. To that extent, taxation of an award of costs is not a fresh cause of action. Hence, the defendants would have to take further steps in the proceedings to have the award of costs quantified. Under the old regime in the RHC 1980, it was taxation of the bill of costs. Once the costs are quantified, and so order, it merged with the main judgment. Thus, the period of limitation to enforce the judgment on costs would be the same as the period for enforcing any judgment. Therefore, the period of limitation to enforce the award of costs, as correctly held by the High Court, was 12 years as provided in s. 6(3) of the Act. However, limitation did not run from the date the Court of Appeal dismissed the plaintiff's appeal *ie*, 5 December 2012; the time commenced from the date of the order which was 31 October 2010. The filing of encl. 15 on 30 April 2018 was well within time. (paras 23 & 25)

- A (3) The reasons for the delay had been explained by the defendants and the High Court had accepted them. That was purely an exercise of discretion by the High Court Judge and there was no reason to disturb that exercise of discretion. In any event, delay not amounting to misconduct could not constitute a ground for depriving a successful party of his costs.
B (para 27)

Obiter:

- C (1) After the coming into force of the ROC 2012, the taxation under the RHC 1980 was abrogated. The court now fixes costs at any stage of the proceeding. Generally, the court fixes costs after hearing submissions of counsel, at any appropriate stage of the proceeding. In some cases, the provisions of O. 59 r. 7 of the ROC 2012 is relied upon and the party entitled to costs may annex to the submission of costs, a bill for such costs which shall be in Form 117. This is usually done in more complex matters that may require a detailed breakdown of costs and disbursements. However, for the ordinary run of the mill matters, simple submissions would suffice for the court to fix costs. Furthermore, under O. 59 r. 7(3) of the ROC 2012, the Court of Appeal, in the exercise of its appellate jurisdiction, could determine and fix costs of the appeal as the costs of proceedings connected with it in the court below.
E (paras 29 & 30)

Case(s) referred to:

- Chin Yoke Choong Bobby & Anor v. Hong Lam Marine Pte Ltd* [2000] 1 SLR 137 CA (*refd*)
F *Punithavathi Ponniah v. Ganendra Torquil Ponnusamy Ganendra & Anor* [2014] 8 CLJ 735 CA (*refd*)
Sime Finance Ltd v. Robin Woon Kim Yan [1997] 2 CLJ Supp 370 HC (*refd*)

Legislation referred to:

- Limitation Act 1953, s. 6(1), (b), (3)
Rules of Court 2012, O. 59 r. 7(3)
G Rules of the High Court 1980, O. 59 rr. 1, 7(2)(c), 12(a), (b), 14(1)(a), (b), (c)
Rules of Supreme Court [UK], O. 62 r. 29
For the appellant - Sana Tufil Ahmad & Surendra Ananth Anandaraju; Chambers Of Sana Ahmad
For the respondent - Ahmiza Ahmad; M/s Halim Ashgar
H [Editor's note: *For the High Court judgment, please see Badru Duja Khan Mohamed Nabi Khan v. Ayaz Ahmad Mohamed Salleh Khan & Ors* [2010] 1 LNS 1403.]

Reported by Najib Tamby

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JUDGMENT

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Vazeer Alam Mydin Meera JCA:

Introduction

[1] The High Court in Malaya sitting at Alor Setar, *via* order dated 31 October 2010 (“order”) dismissed the plaintiff’s claim with costs. The relevant part of the order read:

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... Maka Adalah Dengan Ini Diperintahkan bahawa tuntutan Plaintiff terhadap Defendan-Defendan ditolak dengan kos.

[2] The plaintiff appealed that order. The Court of Appeal dismissed the appeal on 5 December 2012, and affirmed the order.

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[3] The defendants did not act upon the order to tax their costs until 30 April 2018 when encl. 15 was filed by the defendants seeking leave of court for extension of time to proceed with the taxation of costs.

[4] The plaintiff objected to the application in encl. 15. However, the High Court allowed encl. 15. The plaintiff now appeals that decision to this court.

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Antecedent Facts

[5] When the order was made on 31 October 2010, the Rules of the High Court 1980 (“RHC 1980”) was applicable, and since costs were not quantified, the defendants were entitled to tax the costs as provided in O. 59 of the RHC 1980 by filing a bill of costs.

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[6] According to O. 59 r. 1 RHC 1980 – “taxed costs” means costs taxed in accordance with O. 59 and “costs” includes fees, charges, disbursements, expenses and remuneration. Hence, the defendants would be entitled to all or any of these costs elements.

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[7] According to O. 59 r. 12 of RHC 1980, the power to tax costs vests with the Registrar:

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Rule 12. Power of Registrar to tax costs. (O. 59 r. 12)

The Registrar shall have power to tax:

- (a) the costs or arising out of any cause or matter in the Court;
- (b) the costs directed by an award made on a reference to arbitration under any written law or pursuant to an arbitration agreement to be paid;
- (c) any other costs the taxation of which is directed by an order or the Court; and
- (d) any costs directed to be taxed or settled by or under any written law.

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(emphasis added)

A [8] In the present case, the Senior Assistant Registrar/Deputy Registrar at the High Court at Alor Setar would have had the power to tax the defendants' bill of costs in accordance to either O. 59 r. 12(a) and/or (b) of the RHC 1980, as ordered by the High Court Judge in the order dated 31 October 2010.

B [9] The order dated 31 October 2010, however, does not stipulate the time within which the bill of costs is to be filed/presented by the defendants for taxation.

C [10] The defendants, after a lapse of more than seven years, filed a notice of application dated 30 April 2018 (encl. 15) at the Alor Setar High Court for extension of time to execute the order dated 31 October 2010, which was basically to quantify the costs awarded. However, by this time, RHC 1980 had been repealed and replaced by the Rules of Court 2012 ("ROC 2012").

D [11] The plaintiff objected to the application, *inter alia*, on the ground that the defendants were barred by statutory limitation under s. 6 of the Limitation Act 1953. The application was heard by the High Court Judge, who allowed the application in encl. 15. The learned High Court Judge found that the matter was not time-barred, as the order had a 12-year statutory period of limitation in accordance to s. 6(3) of the Limitation Act 1953. The learned judge further held that time for limitation started to run from the date of the Court of Appeal's dismissal of the plaintiff's appeal, which was on 5 December 2012. The plaintiff appeals that decision contending that limitation to enforce the order is six years pursuant to s. 6(1) of the Limitation Act 1953, and that the filing of encl. 15 is out of time.

F **The Issues**

[12] The primary issues are:

(i) whether the court can grant time to the defendants for costs to be taxed; and

G (ii) whether the matter is time-barred under s. 6(1) of the Limitation Act;
Whether The Court Can Grant Time To The Plaintiff To File The Bill Of Costs

H [13] Unlike O. 62 r. 29 of the English Rules of Supreme Court, where there is a time period of three months for proceedings to be commenced for the taxation of costs, neither O. 59 of the RHC 1980 nor O. 59 of the ROC 2012 stipulate any time period for filing the application to tax the costs.

[14] The High Court, in making the order dated 31 October 2010, could have stipulated the time period for the defendants to tax their cost. However, no such time was stipulated in that order.

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[15] Interestingly, O. 59 r. 14(1)(b) of the RHC 1980 provides that where no “period is specified by or under this order or by the court for the doing of anything in or in connection with such proceedings”, the Registrar may “specify the period within which the thing is to be done”.

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[16] Further, O. 59 r. 14(1)(a) of the RHC 1980 provides that the Registrar may “extend the period within which a party is required by or under this order to begin proceedings for taxation or to do anything in or in connection with proceeding before the Registrar”.

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[17] Additionally, under O. 59 r. 14(c) of the RHC 1980 the Registrar may “extend any such period as is referred to in the foregoing provisions of this rule although the application for extension is not made until after the expiration of that period”.

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[18] Hence, under O. 59 of the RHC 1980, the Registrar was given wide discretion to set the time for compliance of an order for taxation of costs, and also to grant extensions of time for compliance.

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Rule 14. Extension, etc. of time (O. 59 r. 14)

(1) *The Registrar may*

(a) *extend the period within which a party is required by or under this Order to begin proceedings for taxation or to do anything in or in connection with proceeding before the Registrar;*

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(b) *where no period is specified by or under this Order or by the Court for the doing of anything in or in connection with such proceedings, specify the period within which the thing is to be done.*

(2) Where an order of the Court specifies a period within which anything is to be done by or before the Registrar then unless the Court otherwise directs, the Registrar may from time to time extend the period so specified on such terms (if any) as he thinks just.

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(3) The Registrar may extend any such period as is referred to in the foregoing provisions of this rule although the application for extension is not made until after the expiration of that period.

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[19] Now, it is obvious from these provisions of the RHC 1980 that when no time for compliance is stipulated in an order for costs, time was at large; and the Registrar had the power to fix time, if the need should arise. There was, however, the provision in O. 59 r. 7(2)(c) of the RHC 1980 which required an applicant not to delay a taxation proceeding unnecessarily, and if there was unreasonable delay, the court may take into account the delay in determining the quantum of costs.

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[20] In this case, the court did not fix time. And when time is not fixed, the defendants were not required to take immediate action to enforce the award of costs. This was the observation of Suriyadi J (as he then was) in *Sime Finance Ltd v. Robin Woon Kim Yan* [1997] 2 CLJ Supp 370, HC, where in reference to a similar argument, he held:

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A Perusing the Rules of the High Court, except for O. 59 r. 7(2)(c) which requires an applicant not to delay a taxation proceeding unnecessarily, **there is no other provision available requiring him to take immediate action to enforce the award of costs after a final judgment.**

B **Only s. 6 of the Limitation Act places some kind of a curtailment to an unbridled period.** (emphasis added)

C That pronouncement was considered with approval by the Court of Appeal in *Punithavathi Ponniah v. Ganendra Torquil Ponnusamy Ganendra & Anor* [2014] 8 CLJ 735, CA. Hence, we find that notwithstanding the application in encl. 15 and the decision of the High Court in respect of that enclosure, there was nothing in law to bar the defendants, purely by reason of passage of time, from executing the order and have the quantum of costs determined.

Whether The Matter Is Time Barred Under Section 6 Of The Limitation Act?

D [21] The plaintiff/appellant contends that based on the Court of Appeal's pronouncement in *Punithavathi*, s. 6(1)(b) of the Limitation Act 1953 applies to an award of costs, and that there is a six-year statutory time bar that starts running from the date of the order dated 31 October 2010.

[22] Section 6(1) of the Limitation Act 1953 reads:

E **6. Limitation of actions of contract and tort and certain other actions:**

6(1) Save as hereinafter provided **the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued**, that is to say:

- (a) actions founded on a contract or on tort;
- F (b) actions to enforce a recognisance;
- (c) **actions to enforce on award;**
- (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

G (emphasis added)

H In *Punithavathi*, the Court of Appeal said that even if an order of costs can be construed as an award similar to that mentioned in s. 6(1)(b) of the Limitation Act 1953, the taxation of costs in that case was commenced well within the six years period. However, it must be noted that there was no definitive pronouncement by the Court of Appeal in *Punithavathi* to the effect that, an award of costs must be acted upon and taxed within six years of the order. The Court of Appeal in *Punithavathi* needs not delve into the question of whether the 12-years limitation under s. 6(3) of the Limitation Act 1953 applied, as the court was of the view that even if the shorter six years under s. 6(1)(b) were to apply, the application therein was within time.

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[23] We find that a plain reading of s. 6(1)(b) of the Limitation Act 1953 shows that it is not applicable to an award of costs, as the word “action” used in that section is in connection with a cause of action. The taxing of the bill of costs is, with respect, not a cause of action to enforce an award, but rather a continuation of proceedings to ascertain the quantum of costs awarded. Thus, an order for costs is a consequential order and therefore must be sought in the proceedings. A fresh action cannot be brought to recover costs. See *Chin Yoke Choong Bobby & Anor v. Hong Lam Marine Pte Ltd* [2000] 1 SLR 137, CA. To that extent, taxation of an award of costs is not a fresh cause of action.

[24] Hence, the defendants would have to take further steps in the proceedings to have the award of costs quantified. Under the old regime in the RHC 1980, it was by taxation of the bill of costs. Once the costs are quantified, and so ordered, it merges with the main judgment. Thus, the period of limitation to enforce the judgment on costs would be the same as the period for enforcing any judgment. Therefore, we find that the period of limitation to enforce the award of costs is 12 years as provided in s. 6(3) of the Limitation Act, which reads:

An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due. (emphasis added)

[25] The High Court Judge had considered the arguments on time bar raised by the parties, and in coming to his decision, had referred to the judgment of this court in *Punithavathi* and had further referred to and applied s. 6(3) of the Limitation Act 1953. For the reasons stated above, we find that the High Court Judge was entirely correct to apply s. 6(3) of the Limitation Act and hold that the period of limitation is 12 years. However, we do not agree with the learned High Court Judge that limitation runs from the date of the dismissal of the plaintiff’s appeal by the Court of Appeal on 5 December 2012. We hold that the time commences from the date of the High Court order dated 31 October 2010 when the award of costs was made. Hence, we find that the filing of encl. 15 on 30 April 2018 is well within time.

[26] The fact that there was a delay of some seven years before the defendants acted on the order dated 31 October 2010, by filing encl. 15, cannot be denied. The defendants had explained the delay by stating that they had initially waited for the plaintiff’s appeal to the Court of Appeal to be heard and disposed. Subsequently, there were several changes of solicitors, and these solicitors had not acted on the defendants’ instructions to tax the costs. The defendants’ present solicitors had then filed encl. 15 when they took over the conduct of the matter.

- A [27] In the present case, the reasons for the delay have been explained by the defendants, and the High Court Judge had accepted them. That is purely an exercise of discretion by the High Court Judge. Having considered the reasons and the facts presented, we do not find any reason to disturb that exercise of discretion by the High Court Judge. In any event, delay not
- B amounting to misconduct cannot constitute a ground for depriving a successful party of his costs. See *Charnjit Singh v. Tan Chow How* [1960] 1 LNS 12; [1960] MLJ 207. And the plaintiff has not shown that he has been prejudiced by the delay, such that the court should now deprive the defendants of their costs.
- C [28] In this regard, we find that there are no appealable errors in the decision of the High Court in respect of encl. 15 that warrant appellate intervention.

The Present Order 59 Of The ROC 2012

- D [29] When the defendants filed their application in encl. 15, the applicable rules would be ROC 2012. After the coming into force of the ROC 2012, the taxation regime under the RHC 1980 was abrogated, and the court now fixes costs at any stage of the proceeding. Generally, the court fixes costs after hearing submissions of counsel, at any appropriate stage of the proceeding.
- E In some cases, the provisions of O. 59 r. 7 of ROC 2012 is relied upon, and the party entitled to cost may annex to the submission of costs, a bill for such costs which shall be in Form 117. This is usually done in more complex matters that may require a detailed breakdown of the costs and disbursements. However, for the ordinary run of the mill matters, simple submissions would suffice for the court to fix costs.

F **Appellate Court's Power To Fix Cost Here And Below**

- [30] Further, under O. 59 r. 7(3) of the ROC 2012, the Court of Appeal, in exercise of its appellate jurisdiction, can determine and fix costs of the appeal as well as the costs of proceedings connected with it in the court
- G below. Order 59 r. 7(3) of the ROC provides:

- (3) In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal and of the proceedings connected with it, may be dealt with by the Court hearing the appeal; and in the case of any proceedings transferred or removed to the High Court from any
- H other Court, the costs of the whole proceedings, both before and after the transfer or removal, may be dealt with by the Court to which the proceedings are transferred or removed.

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Conclusion

[31] We are of the view that the matter ought not to be sent back to the High Court merely for costs to be fixed. In the interest of having this matter disposed-off efficiently without taking up additional judicial time and resources, and without any further delay, we are inclined to apply the provisions of O. 59 r. 7(3) of the ROC 2012, and fix costs of the proceedings at the High Court as per the order, for which encl. 15 was filed, as well the costs of this appeal. In that regard, we invite parties to orally submit on the issue of quantum here and below.

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